INDEX.

I. Preliminary statement 2
II. Argument 6
Summary of argument 6
Point A 7
The Federal Constitution was not intended to interfere with the reasonable exercise of the police power of a state to enact laws for the protection and promotion of the public health, safety or welfare 7
The court is merely concerned with the question of whether the exercise of the police power is proper 8
Point B 9
The right and liberty of contract is not an unlimited right and may be abridged or restricted whenever necessary for the public good or welfare 9
There is no such right as absolute liberty of contract 9

Point C..... 10
The contract clause and the due process clause of the Federal Constitution are merely a limitation on the exercise of the police power of the state but not superior to the exercise of that power..... 10
Point D..... 11
The Fourteenth Amendment to the Constitution of the United States does not prevent a state, when exercising its police power for the purpose of promoting the public welfare by promoting the economic welfare of dairy farmers and assuring an adequate supply of milk to consumers, from fixing the minimum price for which milk may be sold..... 11
Point E..... 14
The business of producing, processing, distributing and selling milk is an activity so charged and affected with a public interest that it may be regulated under the police power of the state and such regulation may include the fixing of a minimum price for which milk may be sold..... 14
The prohibition of giving rebates contained in the New York law is incidental to the power of price fixing..... 15
Point F..... 18
The fixing of minimum prices for milk during the present emergency declared by the Legislature is a valid exercise of the police power.. 18
Conclusion 20
Appendix—Sections 23 and 24 of the Burk Law.... 21

Cases and Authorities Cited.

Atlantic Coast Line R. Company v. Goldsboro, 232 U. S., 548-558 10
Barbier v. Connolly, 113 U. S., 27, 31 8
Block v. Hirsch, 256 U. S., 135 ..... 9, 18, 20
Boston Beer Company v. Massachusetts, 97 U. S., 989 8
Brown Holding Company v. Feldman, 256 U. S., 170. 18
Chicago B. & Q. R. Co. v. McGuire, 219 U. S., 549, 567 ..... 9, 10, 18
Fairmont v. Minnesota, 274 U. S., 1 11
German Alliance Insurance Company v. Lewis, 233 U. S., 389 ..... 8, 15
Gorieb v. Fox, et al., 274 U. S., 603 8
Holden v. Hardy, 169 U. S., 366-398 8
Legal Tender Cases, 12 Wall., 547-551 9
Levy Leasing Company v. Siegel, 258 U. S., 242, 66 L. Ed., 594, 86 A. L. R., 1539 20
Louisville and Nashville Railroad v. Melton, 218 U. S., 36, 52 8
McLean v. Arkansas, 211 U. S., 539 8
Mueller v. Oregon, 208 U. S., 411, 52 L. Ed., 551, 555. 8
Munn v. Illinois, 94 U. S., 113 15
Murphy v. California, 225 U. S., 625, 56 L. Ed., 1229, 1232 8
New Orleans Gas Light Company v. Manufacturing Company, 115 U. S., 650 8
N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S., 556-557.. 9
Otis v. Parker, 187 U. S., 606 16
Rast v. Van Deman & Lewis, 240 U. S., 342 15
Schmidinger v. Chicago, 226 U. S., 578-579 9

Slaughter House Cases, 83 U. S., 394 8
United States and Henry Wallace, Secretary of Agriculture v. Calistan Packers, Inc., Opinion, October 2, 1933 19
Warehouse Co. v. Burley Tobacco Growers, 276 U. S., 71 16
Wilson v. New, 243 U. S., 332 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 531.

LEO NEBBIA,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellees.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May it please the Court:

The undersigned, as counsel for the state of Ohio, respectfully moves this honorable court for leave to file the accompanying brief as amicus curiae.

JOHN W. BRICKER,
Attorney General of Ohio,
Counsel for the State of Ohio, as Amicus Curiae.

Of Counsel:

CHARLES G. WILLIAMS,
ISADORE TOPPER,
Assistant Attorneys General of Ohio.

BRIEF OF JOHN W. BRICKER, ATTORNEY GENERAL OF OHIO, AS AMICUS CURIAE.

I.

PRELIMINARY STATEMENT.

This brief is filed on behalf of the people of the state of Ohio because the effectiveness of practically all of the legislation recently enacted with reference to the milk industry in Ohio and elsewhere depends upon legislation similar to that which is challenged in this case. That the present depression has created a national emergency needs no argument. The cause of the emergency is not military but economic. The results of the emergency imperil the health, safety, convenience and general welfare of every citizen. Unparalleled conditions have required unprecedented (unusual) actions in state and nation. This action has been secured by voluntary cooperation in large measure, but in the last analysis such action is dependent upon laws and penalties which enforce obedience upon a small minority who are not in accord with the emergency measures undertaken.

The state of Ohio has enacted a milk marketing law which is similar in its provisions to the law in New York which is under consideration in this case. Prior to the enactment of this law (Burk Act, House Bill No. 671, enacted by the General Assembly of Ohio in 1933), the milk industry in Ohio was in chaotic condition by reason of the breaking down and demoralization of the milk market. Recognizing the seriousness of the situation,

the governor of Ohio on September 29, 1932, in a special message to the 89th General Assembly which had been called into special session for another purpose, amended his call for that special session so as to include the consideration of the creation of a milk marketing commission. Pursuant to the message of the governor and on the same day, a joint house resolution was adopted for the purpose of investigating the necessity for such legislation. A committee was appointed. It made a report and the aforesaid Burk Bill was the result of that investigation. The Burk Law provides for an Ohio Milk Marketing Commission similar to the New York Milk Control Board, and the Ohio Milk Marketing Commission has similar powers of investigation, of price fixing, of issuing licenses, of enforcement and of price schedules.

The statement of the purpose of the Ohio law was stated by the Legislature in Section 2 of the bill and reads as follows:

> "The production, processing, distribution and sale of milk in this state as a whole, and each of said activities or operations, separately, is hereby declared to be a business charged with a public interest. The reason therefor lies in the following facts:
>
> Milk under present conditions is a necessary article of human food for which there is no adequate substitute. The procurement and maintenance of an adequate supply of milk, of proper chemical and physical content, and free from contamination or source of infection, is vital to the public health.
>
> Under the social conditions obtaining in this state, the needs of a great majority of the people for milk cannot be satisfied excepting through a system of distribution which can effectively bridge the gap between the producer and the ultimate consumer.

Sanitary regulations and standards of content and purity adopted by health authorities, however effectively enforced, have been found in actual experience in this state insufficient in and of themselves to insure such control of the system of marketing milk as to safeguard the consuming public and the persons engaged in the milk industry in its various branches against evils which threaten the economic integrity of the industry and tend to undermine such health regulations and standards themselves. Such evils consist of unfair, unjust, destructive and demoralizing trade practices, which have been and are now being carried on in the production, sale and distribution of milk. The conditions resulting therefrom constitute a menace to the health and welfare of the inhabitants of this state.

It is and has been the policy of this state to foster and encourage sound and effective methods of marketing agricultural food products of this state, as evidenced by the creation of the bureau of markets in the department of agriculture, pursuant to Section 1089-2 of the General Code, by the enactment of laws relative to co-operative agricultural associations, as evidenced by Sections 10186-1 to 10186-30 of the General Code, and particularly by Section 10186-26 thereof, and to protect the agricultural interests of this state against unfair and discriminatory practices in connection with marketing, as evidenced by Section 6401-2 of the General Code.

As a result of this policy the normal process of marketing milk has come to be a co-operative enterprise which ought to be safeguarded and protected by social control. It is the intent and purpose of this act more effectually to promote the settled policy of this state as so established, so far as the marketing of milk is concerned, and to provide an effective means of social control to that end."

The Burk Act was passed as an emergency measure by a two-thirds vote of the Ohio Legislature and is declared to be "necessary for the immediate preservation of the public peace, health and safety". (Section 24). Section 23 provides that this act shall expire on the first day of July, 1935. After the Burk Act was enacted by the Legislature of the state of Ohio, a milk marketing commission was appointed in accordance with the terms of the act. Thereafter the Ohio Milk Marketing Commission fixed a minimum retail price schedule for milk for the city of Columbus, Ohio. That price schedule has been violated by a certain chain grocery company and the validity of the schedule has been challenged in the Supreme Court of Ohio wherein an action in quo warranto has been filed against the aforesaid violator in order to enforce the provisions of the Burk Act. In that action the constitutionality of the Burk Act has been challenged. The main issue in that case is similar to that in the instant case, that is, whether the state has the power to fix a minimum retail price for milk during the present emergency and whether the Federal Constitution prohibits a state from passing legislation fixing a minimum retail price for milk in the present emergency.

II.

ARGUMENT.

SUMMARY OF ARGUMENT.

Point A.

The Federal Constitution was not intended to interfere with the reasonable exercise of the police power of a state to enact laws for the protection and promotion of the public health, safety or welfare.

Point B.

The right and liberty of contract is not an unlimited right and may be abridged or restricted whenever necessary for the public good or welfare.

Point C.

The contract clause and the due process clause of the Federal Constitution are merely a limitation on the exercise of the police power of the state but not superior to the exercise of that power.

Point D.

The Fourteenth Amendment to the Constitution of the United States does not prevent a state, when exercising its police power for the purpose of promoting the public

welfare by promoting the economic welfare of dairy farmers and assuring an adequate supply of milk to consumers, from fixing the minimum price for which milk may be sold.

Point E.

The business of producing, processing, distributing and selling milk is an activity so charged and affected with a public interest that it may be regulated under the police power of the state and such regulation may include the fixing of a minimum price for which milk may be sold.

Point F.

The fixing of minimum prices for milk during the present emergency declared by the Legislature is a valid exercise of the police power.

POINT A.

The Federal Constitution Was Not Intended to Interfere With the Reasonable Exercise of the Police Power of a State to Enact Laws For the Protection and Promotion of the Public Health, Safety or Welfare.

This court has on numerous occasions held that the Federal Constitution is not intended to interfere with the police power of a state to enact legislation for the protection and promotion of the public health, safety or welfare, provided such legislation is reasonable and has

a real and substantial relation to the public object sought to be accomplished.

Barbier v. Connolly, 113 U. S., 27, 31;
Murphy v. California, 225 U. S., 625, 56 L. Ed., 1229, 1232;
McLean v. Arkansas, 211 U. S., 539;
Louisville and Nashville Railroad v. Melton, 218 U. S., 36, 52;
Mueller v. Oregon, 208 U. S., 411, 52 L. Ed., 551, 555; and
New Orleans Gas Light Company v. Manufacturing Company, 115 U. S., 650.

The Court Is Merely Concerned With the Question of Whether the Exercise of the Police Power Is Proper.

It is a familiar rule of law that the Legislature determines the necessity for the legislation and the courts determine if it is a proper exercise of its police power.

Slaughter House Cases, 83 U. S., 394;
Boston Beer Company v. Massachusetts, 97 U. S., 989;
German Alliance Insurance Company v. Lewis, 233 U. S., 389;
Holden v. Hardy, 169 U. S., 366, 398;
Gorieb v. Fox, et al., 274 U. S., 603;
McLean v. Arkansas, supra.

POINT B.

The Right and Liberty of Contract Is Not An Unlimited Right And May Be Abridged Or Restricted Whenever Necessary For the Public Good Or Welfare.

The so-called right or liberty of contract, the protection of which is usually invoked in cases of this type, is not an unlimited or unbridled right or privilege but is a right or privilege which is subordinate to any legislative enactment which has for its object the comfort, the safety, the convenience, the general prosperity or welfare of society.

N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S., 556, 557;
McLean v. Arkansas, 211 U. S., 539, 545, 547;
Chicago B. & Q. R. Co. v. McGuire, 219 U. S., 549, 567;
Legal Tender Cases, 12 Wall., 547, 551.

There Is No Such Right As Absolute Liberty of Contract.

This court has held that there is no such thing as the absolute liberty of contract.

Schmidinger v. Chicago, 226 U. S., 578, 579;
Block v. Hirsch, 256 U. S., 135.

POINT C.

The Contract Clause and the Due Process Clause of the Federal Constitution Are Merely a Limitation on the Exercise of the Police Power of the State But Not Superior to the Exercise of That Power.

It is also a familiar rule that neither the contract clause nor the due process clause of the Constitution is superior to the exercise of the police power of the state. **Chicago B. & Q. R. Co. v. McGuire**, supra; **Atlantic Coast Line R. Company v. Goldsboro**, 232 U. S., 548, 558. The broad power of sovereignty called the police power which may invade the right of contract protected by the Federal Constitution and which invasion has been upheld by the courts of this country many times is a power that is indefinable and the courts have confessed their inability to form a general definition for that power. By reason of this inability to form a general definition, the courts have constantly dealt with each case separately so that an examination of the cases wherein the exercise of this power has been questioned merely shows the different phases of its application to various subjects. The police power has been exercised in many ways and it generally consists of either regulatory or prohibitory legislation. The various subjects which have received legislative attention because of public interest are too innumerable to mention in this brief.

POINT D.

The Fourteenth Amendment to the Constitution of the United States Does Not Prevent a State, When Exercising Its Police Power For the Purpose of Promoting the Public Welfare By Promoting the Economic Welfare of Dairy Farmers and Assuring an Adequate Supply of Milk to Consumers, From Fixing the Minimum Price For Which Milk May Be Sold.

It is "the duty of the court to inquire into the real effect of any statute". **Fairmont v. Minnesota,** 274 U. S., 1. The real effect of the New York law under consideration and similar laws is quite clear. By requiring a minimum retail price, such a law provides a stable market not subject to underselling and price cutting of milk and, since the distributors' share of the retail price is also fixed and under control, a minimum price is secured for the farmer for his milk. The effect of this is that the farmer gets a better price for his milk and a more steady price. The effect of this increase in stabilization of the farmer's purchasing power is that he will buy more of the manufactured products of the city and this will tend to improve general economic conditions and improve the general welfare. It is a theory of present day economic law that the existing economic dilemma results from the fact that we do not have enough consumers, and that the modern economic cycle

tends to become a vicious circle wherein the purchasing power of the mass of the people becomes progressively less. To break this vicious circle and to initiate a benevolent cycle whereby the purchasing power of the general public is increased is a problem with which the nation and many states are now grappling. Evidently, in the mind of the Legislature, one way to do this was to fix a price for a necessity sufficient to increase and stabilize the purchasing power of the producer of that necessity. This is what the milk law proposes to do. Many voluntary methods of increasing the price of commodities have been attempted and many circuitous attempts to increase these prices involuntarily have been attempted. The New York law proposes to fix a proper price for milk simply by fixing it. Is such an act forbidden under the Fourteenth Amendment? It seems to us that the answer is no, inasmuch as this legislation is not in terms in conflict with the provisions of the Constitution of the United States. It is perhaps in conflict with many economic interpretations of the Constitution laid down by this court. In the present emergency, we have found that many so-called "economic laws" have been deemed unworkable or inadequate under present circumstances or were never laws at all. This court has in the past interpreted the Constitution in the light of some of these economic laws which were in accord with the best judgment and sense of justice then prevailing. Unless the changes in these economic laws are considered by this court in interpreting the Constitution, legislation which is necessary to cope with the present emergency

will be held invalid and in the stress of the emergency the people will be helpless to enforce the very measures which they deem are necessary to promote the welfare and the convenience of the public. It seems to us that the only way a state can protect the well-being of its citizens and at the same time prevent the bankruptcy of an industry which is closely identified with and related to the public welfare is by the exercise of the police power in the manner in which the Legislature of New York has exercised it in the instant case. By fixing the minimum price for which milk may be sold, the Legislature in effect assures the producer and the distributor of milk an adequate return for their investment and labor. Such an assurance accomplishes both the purpose of protecting the well-being of its citizens and at the same time prevents the bankruptcy of the milk industry. That there is an interrelation between the price received by the producer and distributor of milk and the supply and quality of milk received by consumers is a fact which needs no supporting data or argument. At first blush, it may perhaps be felt that the act of fixing the minimum price at which milk may be sold is an attempt to disregard and discard the economic law of supply and demand. However, on fuller consideration, it would appear, in view of the emergency that exists in the milk industry throughout the country, especially in the state of New York, that the law authorizing price fixing is merely an attempt to aid the economic law of supply and demand to function normally by preventing the sale of milk at prices which are insufficient to assure producers and distributors a return which fact tends to demoralize the market and the industry.

POINT E.

The Business of Producing, Processing, Distributing and Selling Milk is an Activity So Charged and Affected With a Public Interest That It May Be Regulated Under the Police Power of the State and Such Regulation May Include the Fixing of a Minimum Price For Which Milk May Be Sold.

The Legislature of New York has found that the fluid milk industry is clothed with a public interest as has the Legislature of the state of Ohio. These findings are based upon extensive economic studies. Milk is unquestionably the sole food for babies and certain invalids, and is imperative for growing children. Milk contains elements needed by every human being, which elements can be supplied in no other way as economically. Milk, especially fluid milk, is highly perishable and must be distributed comparatively near its place of production. A herd of cows produces milk seven days a week; the production of a herd is based not upon the economic laws of supply and demand, and is only slightly under the control of its owner. The dairy farmer must sell his milk immediately upon its production at a place not too far from his farm. Public health requirements for milk are an expense to the producer and to the distributor. Entirely apart from the economic benefit to the producer the legislatures have come to the conclusion that the maintenance of a stable market for milk is imperative

for the preservation of the public health and that such a stable market can only be maintained by requiring minimum prices and forbidding price cutting which eventually leads to chaos. Is there anything in the Constitution which would require this court to thwart this purpose in order to protect the so-called sacred right of certain retailers to undersell to the detriment of the producers of milk and to their own ultimate detriment? This court in the past has answered that question in the negative. Thus, it was held in the case of **Munn v. Illinois**, 94 U. S., 113, that legislatures could fix prices in a business which was "clothed with a public interest".

See also,

German Alliance Insurance Company v. Lewis, 233 U. S., 389.

The Prohibition of Giving Rebates Contained in the New York Law is Incidental to the Power of Price Fixing.

In **Rast v. Van Deman & Lewis**, 240 U. S., 342, this court upheld a tax law, the "real effect" of which was to prohibit "profit-sharing coupons and trading stamps." This court did not deny the contention of complainants that these coupons "are but a method of giving discount, practically in some instances a rebate upon the price. * * *" (263) This court, in considering the real effect of such rebating found that it might be considered as having the seduction and evil of something like a lottery and it thus might be a matter of legislation as to whether such practice should be stopped. Mr. Justice McKenna, in the course of his

opinion, quoted the following from **Otis v. Parker**, 187 U. S., 606:

> "But it may be said that judicial opinion cannot be controlled by legislative opinion of what are fundamental rights. This is freely conceded; it is the very essence of constitutional law, but its recognition does not determine supremacy in any given instance. 'While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held semper ubique et ab omnibus.' "

In the present case this court is called upon to uphold a law forbidding rebating in order to protect milk marketing agreements. The protection of similar cooperative agricultural agreements has been upheld by this court. In **Warehouse Co. v. Burley Tobacco Growers**, 276 U. S., 71, this court upheld a law which provided a fine for interfering with tobacco growers' cooperative association contracts. The purpose of the cooperative marketing agreements was, of course, to secure a larger return to the farmer, the very purpose of the New York law now before the court. In the tobacco growers case Mr. Justice McReynolds said (92):

> "Undoubtedly the statute does prohibit and penalize action not theretofore so restricted and to

that extent interferes with freedom. But this is done to protect certain contracts which the Legislature deemed of great importance to the public and peculiarly subject to invasion. We need not determine whether the liberty protected by the Constitution includes the right to induce a breach of contract between others for the aggrandizement of the intermeddler—to violate the nice sense of right which honorable traders ought to observe."

Referring to the cooperative marketing statutes it was said (92):

"These statutes reveal widespread legislative approval of the plan for protecting scattered producers and advancing the public interest."

In the court below it was said:

"We take judicial knowledge of the history of the country and of current events and from that source we know that conditions at the time of the enactment of the Bingham Act were such that the agricultural producer was at the mercy of speculators and others who fixed the price of the selling producer and the final consumer through combinations and other arrangements, whether valid or invalid, and that by reason thereof the former obtained a grossly inadequate price for his products. So much so was that the case that the intermediate handlers between the producer and the final consumer injuriously operated upon both classes and fattened and flourished at their expense. It was and is also a well known fact that without the agricultural producer society could not exist and the oppression brought about in the manner indicated was driving him from his farm thereby creating a condition fully justifying an exception in his case from any provision of the common law, and likewise justifying legislative action in the exercise of its police power."

These words apply with equal force to the dairy farmer who is protected by the milk marketing laws.

In **Chicago B. & Q. Ry. Co. v. McGuire**, 219 U. S., 549, Mr. Justice Hughes said (567):

> "* * * freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards."

POINT F.

The Fixing of Minimum Prices for Milk During the Present Emergency Declared by the Legislature Is a Valid Exercise of the Police Power.

This court has sustained far greater infringements on the right of contract in emergencies which were less stringent in their economic aspect than the present emergencies.

Wilson v. New, 243 U. S., 332;
Block v. Hirsch, 250 U. S., 134;
Brown Holding Company v. Feldman, 256 U. S., 170.

The lower courts in interpreting marketing laws during this emergency have upheld the constitutionality of measures similar to the one in this case.

The provisions of the agricultural adjustment act passed by Congress are similar to the New York milk distribution act. The act of Congress was held consti-

tutional in the case of **Beck v. Wallace, Secretary of Agriculture,** in the Supreme Court of the District of Columbia. The plaintiff, a milk dealer, attempted to enjoin the enforcement of the milk marketing regulations for the Chicago milk shed. The court denied the injunction and dismissed the complaint, holding:

> "The day is passed when absolute vested rights in contract or property are to be regarded as sacrosanct or above the law. Neither the necessities of life nor commodities affected with the public interest can any longer be left to ruthless competition or selfish greed for their production or distribution.
>
> The court finds that the agricultural adjustment act passed by Congress May 1, 1933, is constitutional, and that the regulations and licenses promulgated and issued thereunder are reasonable and valid."

In the case of **United States and Henry Wallace, Secretary of Agriculture v. Calistan Packers, Inc.,** defendant, in the United States District Court, San Francisco, California, an opinion was handed down, October 2, 1933, by Judge St. Sure, upholding the constitutionality of the licensing provisions issued to enforce agreements entered into under the A. A. A.

The court reviewed the economic situation of the country and the connection of the peach industry with it, and held:

> "The due process clause in such a situation cannot properly be construed to obstruct the national policy. Neither the Constitution nor the due process clause requires the perpetuation of conditions which impair the national vitality.

> To adopt the view that the Constitution is static and that it does not permit change from time to time to take such steps as may reasonably be deemed appropriate to the economic preservation of the country is to insist that the Constitution was created containing the seeds of its own destruction. This court will not subscribe to such a view."

The declaration of an emergency contained in the New York law, although not conclusive upon this court, is entitled to great respect. See **Block v. Hirsch**, 256 U. S., 134; **Levy Leasing Company, Inc. v. Siegel**, 258 U. S., 242, 66 L. Ed., 594; 86 A. L. R., 1539 (note on governmental powers in peace time emergency).

CONCLUSION.

In view of the foregoing, we submit that it is a valid exercise of the police power for a state Legislature in an emergency to fix a minimum price at which milk may be sold, and for that reason the constitutionality of the New York law should be upheld.

Respectfully submitted,

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APPENDIX.

Sections 23 and 24 of the Burk Law (House Bill No. 671, enacted by the General Assembly of Ohio in 1933) read:

Section 23. Unless extended by the General Assembly, this act shall expire on the first day of July, 1935, and all books, papers and records of the Ohio milk marketing commission hereby created shall be thereafter disposed of as the director of agriculture may prescribe.

Section 24. This act is hereby declared to be an emergency law, necessary for the immediate preservation of the public peace, health and safety. The reason for such necessity is that evils consisting of unfair, unjust, destructive and demoralizing trade practices are now being carried on in the production, sale and distribution of milk for human food, resulting in the undermining of existing health regulations and standards, the demoralization of the agricultural interests of this state engaged in the production of milk, and conditions inimical to the health of milk consumers; and that such conditions have progressed to the point of immediate danger not only to the public health but also to the public peace and safety. Therefore, this act shall take effect immediately.